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IN THE

Supreme Court of the United States

October Term, 1953.

No. 325.

COLUMBIA PROPERTIES, INC., Appellant,

versus

STATE BOARD OF TAX COMMISSIONERS OF THE STATE OF INDIANA, ET AL., Appellees.

Appeal from the Supreme Court of Indiana.

APPELLANT'S BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM.

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APPEAL FROM THE SUPREME COURT OF INDIANA.

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May it please the Court:

Pursuant to Rule 7(3) of the Rules of this Court, we file this brief in opposition to the appellees' motions to dismiss or affirm.

ARGUMENT.

I. The State Court's Decision Does Not Rest on an Adequate Non-Federal Ground.

Appellees urge that the decision under review rests on an adequate non-Federal ground because of the State court's ruling that appellant's pleading* contains "not * * * conclusions of fact, but conclusions of law." This ruling is just as clearly erroneous as a decision can be, and presents a Federal question reviewable here.

The purpose and effect of the pleading was to raise three questions or groups of questions: (a) Whether the assessments were invalid under Indiana law; (b) whether appellant had been denied a constitutionally sufficient hearing on the facts; and (c) whether the assessments, being based on a factual determination which was not only erroneous, but utterly without factual foundation, effected an arbitrary and unconstitutional discrimination against the appellant. We have no apologies to make for the pleading. We think it raises these questions by factual allegations as explicit as the English language permits.

We bow to the power of the highest State court in so far as the first question—validity under State law—is concerned. But we deny the power and the right of that court to nullify, by an impossibly rigorous rule of practice, the protection afforded to Indiana tax-

*The Amended Petition in Appeal and Amended Complaint is the only pleading here involved and, for simplicity, is herein referred to as "the pleading."

payers by the due process and equal protection clauses of the Fourteenth Amendment.

The guarantees of the Fourteenth Amendment are illusory unless the courts will entertain seasonable, explicit and well-pleaded claims that those guarantees have been infringed. The appellant in this case has suffered tax assessments believed to be unjust and illegal both in origin and in effect. At every possible stage of the proceeding it has offered to prove that the assessments are grossly excessive because based on a fantastic misconception of the facts, and that the assessments subject appellant to intentional, purposeful and arbitrary discrimination as compared with the owners of similar and competing properties. The administrative officials have listened politely to appellant's evidence, have received no contrary evidence in appellant's presence, have given no reason for rejecting appellant's contentions—but have upheld the assessments. Appellant by its pleading in this case has asked the Indiana courts to grant appellant a constitutionally sufficient hearing, at which it will have an opportunity to know and refute the evidence against it, if any. As we shall show, the pleading sets forth facts sufficient to lay a basis for the Federal claims. The trial court has held that the pleading fails to state a cause of action. The Indiana Supreme Court has gone even further, saying that the pleading contains no factual allegations, but only conclusions of law, and for that reason has declined even to consider the merits of either the State or the Federal claims.

If an examination of the pleading convinces this Court, as we think it will, that the pleading does set up the Federal claims by sufficient factual allegations —that, indeed, it would hardly have been possible to plead them more clearly and circumstantially—then the State court had no right, under the Federal Constitution, to refuse to consider them. Federal rights can not be so easily smothered. Under the authorities cited in Paragraph 9 C. of our Statement as to Jurisdiction, the sufficiency of a pleading to set up a Federal question is itself a Federal and not a State question, and the State court's decision does not foreclose review here.

On the question whether the pleading does allege facts rather than legal conclusions, we are content to let it speak for itself. It begins by identifying the appellant and the properties assessed (Paragraphs 1-3). It then sets forth, so far as relevant, the provisions of the Indiana Reassessment Act of 1949 and the administrative regulations thereunder, which provide that real property shall be assessed by the methods prescribed by a certain manual called "Real Estate Assessment Guide No. 1" (Paragraphs 4-5). A copy of this manual is incorporated in the pleading as "Exhibit A" (Transcript, p. 99).

The pleading then explains the five-step valuation procedure prescribed by the manual for residential improvements (Paragraph 6). The pleading makes clear that a key step in this procedure is determination of "basic reproduction cost per square foot," which depends on a factual determination as to the "grade"

or cost group in which the residence falls—"Low Cost," "Average" or "Good." The manual itself contains the factual criteria to be followed in determining which grade is applicable. It says (p. 44):

> "Low cost grade would apply to residences built with little or no regard to building codes, of sub standard materials and workmanship."

The pleading reveals that the effect of grading appellant's properties as "Average" rather than "Low Cost" is to increase the basic reproduction cost per square foot from $3.00 to $3.95, or more than thirty per cent. This is shown by the data sheet which is incorporated into the pleading as "Exhibit B," taken together with the table set forth at the top of page 65 of the manual (Exhibit A to the pleading).

Having thus made clear the materiality and practical effect of grading the properties as "Average," rather than "Low Cost," the pleading goes on to allege that the assessment officials purported to apply the aforesaid statute, regulation and manual in making the questioned assessments (Paragraph 7, first sentence); that all available administrative remedies had been exhausted; that at no stage of the administrative proceedings was any evidence introduced in appellant's presence, other than appellant's own evidence; and that the resulting assessments were without reasonable basis in fact and were excessive (Paragraph 7 (a)-(e)). These allegations are set forth in painstaking detail, covering more than four pages of the record.

Paragraph 8 of the pleading then sets forth the substance of appellant's factual contentions. We think it so remarkable that the allegations of this paragraph be disregarded by the State court as "conclusions of law" that we set them forth in full:

> "(8) The determinations of the County Board of Review and the State Board of Tax Commissioners that the said improvements are properly classified as 'Average' rather than 'Low Cost' are unlawful, arbitrary, capricious and without reasonable basis in fact, and deprive the plaintiff of its property without due process of law and deny the plaintiff the equal protection of the laws, all in violation of the Fourteenth Amendment of the United States Constitution and deprive the plaintiff of its remedy by due course of law in violation of Article One, Section twelve of the Constitution of Indiana, and deprive the plaintiff of its right to a uniform and equal rate of assessment and taxation in violation of Article Ten, Section One of the Indiana Constitution, for the following reasons among others:
>
> "(a) The said improvements were constructed as emergency war housing in 1943, for the purpose of affording living quarters to the employees of local industrial plants, which had greatly expanded by reason of the wartime emergency. Because of the great urgency of the need, and because of wartime shortages of materials and skilled labor, it was necessary to construct these apartments, and they were constructed, in a very short space of time, and under adverse weather conditions detrimental to the quality of the said structures *with little*

regard to building codes and of substandard materials and workmanship since inferior labor and materials were the only labor and materials available. In the design and construction of the apartments everything was sacrificed to the pressing need to simplify construction and save time and materials, with the result that their design and construction is inferior to the design and construction of the average apartments constructed in peacetime. There is no reasonable basis in fact upon which these apartment improvements can be graded in any other classification than 'Low Cost,' as that term is used in the instructions set forth in said Real Estate Assessment Guide No. 1.

"(b) There are in Vanderburgh County two and only two other apartment properties which are comparable to the apartment improvements here in question. The names of the two said apartment properties, both of which are in active competition with the apartment properties here involved are Anchor Court and Rotherwood Court. Each of said apartment properties consists of a number of 8-apartment units of improvements identical in size and similar in design to those here involved. The Anchor Court Apartments were built at approximately the same time as the apartment properties here involved, but were constructed of a somewhat better grade of materials because, being a small project, they did not require such large quantities of materials and procurement problems were therefore simplified. The County Board of Review nevertheless graded the Anchor Court Apartments as 'Low Cost,'

and they have consequently been assessed at $6,970.00 for each 8-apartment unit of improvements, as compared with $8,700.00 for the forty-five (45) 8-apartment units of improvements here involved. The Rotherwood Court Apartments were built in 1941, before the stringency of wartime shortages of labor and materials had made itself felt, and are of much better construction, both as to workmanship and as to materials, than the apartment improvements here involved. The Rotherwood Court Apartments have been graded 'Average'; and of the twelve (12) 8-apartment units of improvements which comprise them, nine (9) have been assessed at $7,340.00, two (2) have been assessed at $7,190.00, and one (1) has been assessed at $7,440.00, as compared with $8,700.00 for the forty-five (45) 8-apartment units of improvements here involved. In grading the Anchor Court Apartments as 'Low Cost' and the apartment improvements here involved as 'Average'; in grading the Rotherwood Court Apartments and the apartment improvements here involved as both 'Average'; and in assessing the apartment improvements at Anchor Court and Rotherwood Court at far less than the apartment improvements here involved, the assessment authorities have discriminated against the plaintiff unlawfully, arbitrarily, capriciously and without reasonable basis in fact." (Italics added.)

It will be noted that the italicized portion of Paragraph 8(a) brings the appellant's properties precisely within the definition of "Low Cost" which appears at

page 44 of the assessment manual, and which is quoted above.

Paragraphs 9 and 10 point up the claims under the Fourteenth Amendment, which are mentioned briefly in Paragraph 8. Paragraph 10(c) includes the following allegation:

> "(c) They [the appellees] assessed each of the said improvements at a value so grossly excessive and so far in excess of the assessments made on similar properties in the same locality, as to compel the conclusion that the assessments here involved were made in disregard of the applicable laws, rules, regulations, forms and standards, *and resulted from an intentional and purposeful discrimination against the plaintiff* [appellant], all of which has deprived the plaintiff of its property without due process of law and denied to the plaintiff the equal protection of the laws, in violation of the Fourteenth Amendment of the United States Constitution * * *." (Italics added.)

In view of the suggestion made by certain of the appellees that the pleading "studiously avoids any direct allegation of intentional or purposeful discrimination by the assessing authorities," we desire to point out that the above-quoted excerpt from Paragraph 10(c) does contain just such an allegation. The pleading puts the appellees and the court on notice that the intentional and purposeful discrimination is to be proved by the gross excessiveness of the assessments themselves, and by a comparison between those assessments and the assessments made on similar properties in the same locality, rather than by examination of

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the assessment officials as to their state of mind. But this indication as to the type of proof to be adduced is by no means a qualification of the allegation of intentional and purposeful discrimination. If anything, it makes it more emphatic. The obvious purpose and effect of the statement as to the proposed method of proof was simply to make it clear that appellant intended to avoid the method disapproved by this Court in *Chicago, B. & Q. Ry. Co.* v. *Babcock,* 204 U. S. 585, 593 (1907), which is cited and relied upon by appellees—namely, "cross-examination [of the assessment officials] with regard to the operation of their minds."

Paragraphs 11 and 12 of the pleading are not important for present purposes. They allege facts showing that judicial review was timely sought, and lay the basis for the prayer for relief.

The foregoing review of the pleading is sufficient to show that it does allege *facts* showing a violation of the rights of appellant under the Fourteenth Amendment. For that reason, the State court's judgment of affirmance cannot be held to rest on an adequate non-Federal ground.

II. The Appellant Made a Timely Attack on the Indiana Assessment Statutes, as Construed, and the Highest State Court Has Necessarily Upheld Their Validity.

The Federal questions raised on this appeal (except, of course, the question discussed in Point I of this brief, which arose for the first time upon the rendition of the judgment under review) were specifically presented to the State Supreme Court for deci-

sion. The sixth and seventh assignments of error on the appeal to that court (Transcript, pp. 5-6) are as follows:

"6. The Court erred in holding that the statutes of the State of Indiana relating to property tax assessments (including but not being limited to Acts of the Indiana General Assembly 1927, Chapter 91, Sec. 2, page 233 (Burns Indiana Statutes Annotated, 1951 Replacement, Section 64-1020) and Acts of the Indiana General Assembly 1949, Chapter 225, p. 722) authorize the making of final tax assessments of the appellant's property without opportunity to the appellant to obtain a full hearing by an impartial tribunal on the correctness of such assessments, including an opportunity to confront and cross-examine opposing witnesses and to hear and refute their testimony; *and in holding that the said statutes, as so construed, do not deprive the appellant of its property without due process of law in violation of the Fourteenth Amendment of the United States Constitution.*

"7. The Court erred in holding that the statutes of the State of Indiana relating to property tax assessments (including but not being limited to Acts of the Indiana General Assembly 1949, Chapter 225, p. 722) authorized final tax assessments of appellant's property at valuations that arbitrarily discriminate against the appellant and the appellant's property as compared to the tax assessments of other similar properties in the same locality, *and in holding that the said statutes, as so construed, do not deny to the appellant the equal protection of the laws in violation of the*

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Fourteenth Amendment of the United States Constitution; and in holding that such arbitrarily discriminatory tax assessments of the appellant's property do not deny to the appellant the equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution." (Italics added.)

These assignments of error have been renewed almost *verbatim* in the assignments of error on the present appeal to this Court; they have been modified only to the extent of omitting questions of statutory construction, which were open to review by the State court, but are not open here.

In their Statements opposing jurisdiction, the appellees have either overlooked or have misunderstood the italicized portions of the above-quoted assignments of error. One of the said Statements declares, without citation of authority, that these assignments of error are "improper and presented no question." The other Statement asserts, without elaboration of argument, that they "do not in any manner challenge the validity of any state statute."

These contentions are unsound. The assignments of error are clear and to the point. They performed their function of informing the State Supreme Court that appellant was contending not only that the assessments were unauthorized by the applicable statutes, but that if the statutes should be held to authorize them, then the statutes as so construed are themselves invalid under the Fourteenth Amendment.

It is, of course, true that this Court, on review of a State court decision, will not adjudicate the validity of a State statute unless the highest State court has had an *opportunity* to construe it and pass upon the objections against it. As Chief Justice Stone said in *Wilson* v. *Cook*, 327 U. S. 474, 480 (1946):

> "The purpose of this requirement is * * * to make certain that no judgment of a state court will be reviewed on appeal by this Court unless the highest court of the state has first been *apprised* that a state statute is being assailed as invalid on federal grounds, * * * or, when the statute, as applied, is so assailed, until it has *opportunity* authoritatively to construe it. * * * This jurisdictional requirement is satisfied only if the record shows that the question of the validity under federal law of the state statute, as construed and applied, has *either* been presented for decision to the highest court of the state, * * * *or* has in fact been decided by it, * * * and that its decision was necessary to the judgment." (Italics added.)

The above-quoted assignments of error did apprise the State Supreme Court that State statutes were being assailed, and gave that court an opportunity to construe them. That was all the appellant could do, and it was therefore all the appellant had to do. It was beyond appellant's power to make the State court write an opinion expressly passing on the due process and equal protection questions. But those questions were presented on the record, and were necessarily decided adversely to appellant's contentions.

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The appellees urge that only the assessments, and not the assessment statutes as such, have been drawn in question. This is the same contention which was considered and rejected by this Court in *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 288-289 (1921):

> "In the state court the plaintiff did not simply claim a right or immunity under the Constitution of the United States, but distinctly insisted that as to the transaction in question the Kentucky statute was void, and therefore unenforceable, because in conflict with the commerce clause of the Constitution. The court did not accede to the insistence, but applied and enforced the statute. *Of course, that was an affirmation of its validity when so applied.*" (Italics added.)

It is worthy of note that in the *Dahnke-Walker* case, as in this case, the State court had refrained from any expression of disregard for the Federal rule of law which had been invoked, but rested decision on a narrow holding that the rule had no application on the particular record. This Court held, however, that the right to appellate review depends on the necessary effect of the State court's judgment, not on the reasoning of its opinion. As was said in *Fiske* v. *Kansas,* 274 U. S. 380, 385 (1927):

> "A decision of a state court applying and enforcing a state statute of general scope against a particular transaction as to which there was a distinct and timely insistence that, if so applied, the statute was void under the Federal Constitu-

tion, necessarily affirms the validity of the statute as so applied * * *."

For the foregoing reasons we submit that the validity of the Indiana assessment statutes was properly drawn in question in the highest State court, and that the final decision of that court was in favor of their validity. This Court therefore has jurisdiction on appeal, under 28 U. S. C., § 1257 (2).

III. This Case Presents Substantial Federal Questions Which This Court Should Review on Certiorari Even If Appeal Were Not Available.

Paragraph 9 of our Statement as to Jurisdiction shows that the Federal questions presented on the present record are substantial, and there is no need to repeat what is said there. It is appropriate, however, to clear up certain misconceptions entertained by the appellees as to the nature of those questions.

First, we desire to make it clear that appellant does not seek judicial review of an "honest mistake or error in judgment" on the part of the assessment officials. Appellant says that its properties have been grossly overassessed as a result of intentional and purposeful discrimination; that the assessments were not simply erroneous but were arbitrary and without reasonable basis in fact; that the assessment officials have made the assessments either on evidence received *ex parte* or on no supporting evidence at all; that appellant has vainly besought the State Court to hear proof of the above facts and to permit appellant to show that, as

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alleged in Paragraph 10 of the pleading, the assessments constitute a constructive fraud on appellant; and that the highest State Court has necessarily held that the Indiana assessment statutes deny appellant a constitutionally sufficient hearing.

Second, appellees say that we have "seized upon one incident in the evaluation process"—the grading of the properties as "Average" rather than "Low Cost." To be sure, the appellant has pointed out the particular factual determination which is claimed to be arbitrarily erroneous; but it has not stopped there. Appellant also attacks the assessments themselves and the statutes under which they were made. The fact that appellant has undertaken to specify the exact point at which the assessment process went off the track does not detract from its more general contentions that the resulting assessments effect an unconstitutional discrimination, that appellant has been denied a constitutionally sufficient hearing, and that the Indiana statutes which authorize such a result are invalid as applied in this case.

Third, we do not contend that overvaluation in itself is unconstitutional. We do contend that the equal protection clause forbids overvaluation resulting from intentional and purposeful discrimination. We do contend that, as this Court held in *Great Northern Railway Co.* v. *Weeks*, 297 U. S. 135, 152 (1936), overvaluation can be so gross as to constitute substantive proof that it was intentional and purposeful. And we do contend that taxpayers are entitled to a

constitutionally sufficient hearing on valuation questions.

In closing, we submit that even if this Court lacked jurisdiction on appeal, the Federal questions presented on this record would call for review on certiorari under 28 U. S. C., § 2103. The decision of the State court is not in accord with the applicable decisions of this Court, cited in Paragraph 9 of our Statement as to Jurisdiction. See Rule 38 (5) (a) of the Rules of this Court.

There can be no doubt that, at a minimum, Paragraphs 8, 9 and 10 of appellant's pleading did specially set up and claim rights, privileges and immunities under the Constitution of the United States. Those claims have been preserved by the assignment of errors in the State Supreme Court and in the assignment of errors here, and are properly reviewable on certiorari.

In addition, the fourth assignment of error in this Court (Transcript, p. 145) raises a Federal question which could not have been raised sooner, namely, the correctness of the State Supreme Court's ruling that the pleading contains not facts, but legal conclusions. This question is also properly reviewable on certiorari, and is so shockingly erroneous as to justify in itself an exercise of this Court's power of discretionary review.

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SUMMARY AND CONCLUSION.

At no stage of this proceeding has appellant been allowed to hear any evidence at all in support of the assessments, if indeed any such evidence exists. The State courts have refused to hear proof that the assessments are grossly excessive, and intentionally and purposefully discriminatory. A State taxing system which puts the taxpayer so completely at the mercy of uncontrolled officialdom is not permissible under our Constitution.

We respectfully submit that the motions to dismiss or affirm should be denied, and that this Court should accept jurisdiction of the case.

Respectfully submitted,

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